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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN JERRY BURMLEY, Defendant and Appellant.	C079800 (Super. Ct. No. P12CRF0383)

A jury convicted defendant Benjamin Jerry Burmley of continuous sexual abuse of a child (Pen. Code, § 288.5; count 4)[1] and three counts of lewd and lascivious conduct upon a child (§ 288, subd. (a); counts 1 through 3). The jury found the defendant engaged in substantial sexual conduct against the victim and that the multiple-victim circumstance applied.

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[1] Further undesignated statutory references are to the Penal Code.

The court sentenced defendant to three consecutive terms of 15 years to life (counts 1 through 3) and stayed a 16-year term for count 4 (§ 654).

Defendant appeals, contending either his conviction on count 4, continuous sexual abuse of a child, or his convictions on counts 1 through 3, (each, lewd conduct) should be vacated because he cannot be convicted of both (counts 1-3 *and* count 4) during the same time periods and against the same victim. He argues the prosecutor failed to charge these crimes in the alternative as statutorily required. He also argues defense counsel rendered ineffective assistance in failing to demur to the defective information. Defendant also contends the trial court prejudicially erred in failing to instruct sua sponte that the charges in counts 1 through 3 and count 4 were alternative charges. Finally, defendant contends the multiple-victim circumstance does not apply because defendant's current convictions involve only one victim.

The People respond that defense counsel rendered ineffective assistance in failing to demur to the information, requiring that defendant's conviction on count 4 be vacated, that the error in failing to instruct on alternative charges is thus moot, and that insufficient evidence supports the jury's finding of multiple victims.

We agree with the People except, we will vacate defendant's conviction on counts 1 through 3 because they carry a lesser aggregate maximum sentence. We will also reverse the jury's true finding on the multiple-victim circumstance. Finally, we will lift the stay on the sentence imposed on count 4 and affirm as modified.

FACTS

In 1997, defendant lived in an apartment below Deanna B. They were friendly. Deanna babysat her four-year-old niece, M.S., two or three times a week. M.S. would visit defendant in his apartment because it was the neighborhood play spot, defendant would give children popsicles, and he let them watch television. Defendant molested M.S. for the first time in the summer. M.S. had gone down to defendant's apartment to watch cartoons. After the other children had left, defendant fondled M.S., had her orally

copulate him, and then he had sexual intercourse with her. She went to the bathroom and noticed blood. Defendant told her not to tell. M.S. returned to defendant's apartment on many occasions because that was where the other children in the apartment complex played and she was confused. Almost every time she was babysat at her aunt's during that year, defendant sexually penetrated M.S., about 50 times. One time, M.S.'s mother Josephine F. could not find M.S. and knocked on defendant's door. No one answered immediately and Josephine became frantic. Eventually, M.S. answered the door with a popsicle. M.S. denied anything had happened. M.S. had frequent urinary tract infections beginning when she was three or four years of age. When M.S. was about 9 or 10 years of age, she told her mother about the abuse. They decided that she was not ready to report the abuse.

The prosecutor introduced evidence of defendant's prior conviction. On December 4, 1997, B.C. and her three-year-old daughter M.W. visited Deanna B. Upon arrival, M.W. went downstairs to visit defendant. Defendant entered a plea of no contest in 1998 for molesting M.W. (§ 288, subd. (a).)

The prosecutor also introduced evidence of defendant's uncharged molestation of his daughter, beginning when she was five or six years of age and stopping when she was 12 years of age. Her mother learned about the abuse and removed defendant from their home. Defendant's daughter was 45 years of age when she testified at defendant's trial on the current charges involving M.S.

DISCUSSION

I

Defendant contends either count 4, continuous sexual abuse of a child (§ 288.5), or counts 1 through 3, lewd conduct (§ 288, subd. (a)), should be vacated because they were alleged to have occurred during the same time period and against the same victim. Defendant argues the prosecutor erred in failing to allege the counts in the alternative and that defense counsel rendered ineffective assistance in failing to demur.

In 1997, when defendant committed the offenses, section 288.5, subdivision (c) provided:

"(c) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim." (Stats. 1989, ch. 1402, § 4, p. 6140.)[2]

The second amended information alleged in counts 1 through 3 that defendant committed the lewd conduct against M.S. (Jane Doe) from January 1, 1997, to December 4, 1997, and alleged in count 4 that he committed the continuous sexual abuse against M.S. (Jane Doe) during the same time period. The charging of the continuous sexual abuse and the specific offenses involving the same victim over the same time period could only be in the alternative – the prosecutor was prohibited from obtaining convictions for continuous sexual abuse and the specific offenses underlying the abuse. (*People v. Johnson* (2002) 28 Cal.4th 240, 248.)

Defense counsel did not demur to the pleading which failed to charge continuous sexual abuse (count 4) in the alternative. In general, a failure to demur forfeits any objection. (*People v. Goldman* (2014) 225 Cal.App.4th 950, 956.) Defendant asserts defense counsel rendered ineffective assistance in failing to demur and the People

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[2] Section 288.5, subdivision (c) now provides: "No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim."

respond that there is no valid tactical reason for failing to demur. We agree with defendant and accept the People's concession. Defendant is prejudiced by counsel's failure, having been convicted on count 4 which completely overlapped the time period/victim as charged in counts 1 through 3. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

The People and defendant claim that defendant's conviction on count 4 must be vacated because his punishment for his convictions on counts 1 through 3 is greater than punishment for a single count of violating section 288.5. (See *People v. Torres* (2002) 102 Cal.App.4th 1053, 1057-1061 [discussing method of determining proper remedy]; see also *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1308-1309.) We agree that defendant's punishment should be commensurate with his culpability. *Torres* stated that "the relevant comparison is between the penalty for violating section 288.5, and the aggregate maximum penalty for the specific counts." (*Torres*, at p. 1058, fn. omitted; see also *Rojas*, at pp. 1308-1309 [commensurate with culpability "will ordinarily translate to upholding whichever conviction resulted in the greater aggregate penalty and vacating the less serious count"].) But the parties have not properly compared the punishment for count 4 versus the punishment for counts 1 through 3.

The triad for violating section 288, subdivision (a) was, at the time of defendant's offenses (Stats. 1995, ch. 890, § 1, p. 6777), and still is, three, six, or eight years. Because we agree with the parties that the multiple-victim circumstance finding under section 667.61 needs to be reversed (see part III, *post*), the 15-to-life punishment does not apply to counts 1 through 3. And counts 1 through 3 are not sentenced as full, consecutive terms since a violation of section 288, subdivision (a) is not listed in section 667.6. Thus, the maximum the court could impose on counts 1 through 3 would be a total aggregate sentence of 12 years, that is, the upper term of eight years for count 1 and a consecutive one-third the midterm or two years each for counts 2 and 3. (§ 1170.1, subd. (a).) For count 4, the court imposed and stayed the upper term of 16 years. Count

4 carries the greater maximum sentence as opposed to the maximum aggregate penalty for counts 1 through 3. We will reverse counts 1 through 3 and lift the stay of punishment on count 4, resulting in a prison sentence of 16 years.

II

Defendant claims that the trial court prejudicially erred in failing to instruct sua sponte that the charges in counts 1 through 3 and the charge in count 4 were alternative charges. In the alternative, defendant claims defense counsel rendered ineffective assistance in failing to request the instruction. These claims are moot in view of our conclusion that his convictions on counts 1 through 3 must be reversed.

III

Finally, defendant contends the multiple-victim circumstance does not apply because defendant's current convictions involve only one victim. Defendant claims in the alternative that defense counsel rendered ineffective assistance in failing to object.

Although noting that defense counsel failed to raise this issue in the trial court,[3] the People respond that defendant's claim is not forfeited because it is an attack on the sufficiency of the evidence. As such, the People concede that defendant was not convicted of an offense against more than one victim in the present case. We agree that either the evidence is insufficient or defense counsel rendered ineffective assistance in failing to object.

The information alleged the multiple-victim circumstance as follows:

"It is further alleged, within the meaning of Penal Code section 667.61 [subdivisions] (b) and (e)(5), as to Counts 1 through 3, that the following circumstances apply: The Defendant has been convicted in the present case or cases of committing Penal Code section 288, subdivision (a) against more than one victim. Defendant was

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[3] Defense counsel argued that defendant's 1998 conviction was inadmissible because it did not qualify as a "prior conviction."

convicted in the El Dorado County Superior Court of a violation of Penal Code section 288, subdivision (a) on May 1, 1998, in case number PR-000502. Defendant's conviction in PR-000502 was for an offense date of December 4, 1997."[4]

The prosecutor claimed that defendant's 1998 conviction was admissible to prove the multiple-victim circumstance, explaining "we have to show that he's convicted of two or more counts against two or more victims of specified crimes, including [section] 288 [subdivision] (a). [¶] So in this case we're saying that he was in the same time frame, although not tried together because we didn't find out about them at the same time, that they were concurrent in time, so, therefore they qualify under multiple victim enhancement."

The trial court agreed with the prosecutor and also noted that the prior was admissible as propensity evidence.

At the time of defendant's offenses, former section 667.61, subdivision (e)(5) provided that in order for the multiple-victim circumstance to apply, the jury had to find that defendant "has been convicted *in the present case or cases* of committing an offense specified in subdivision (c) against more than one victim." (Italics added.)[5] The plain

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[4] As added in 1994, and applicable here, former section 667.61 provided, in relevant part, as follows:

"(b) . . . [A] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years . . . . [¶] (c) This section shall apply to any of the following offenses: [¶] . . . [¶] (7) A violation of subdivision (a) of Section 288, . . . [¶] . . . [¶] (e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." (Stats. 1993-1994, 1st. Ex. Sess., ch. 14, § 1, pp. 8570-8571.)

[5] Section 667.61, subdivision (e)(5) now relates to tying or binding the victim. Subdivision (e)(4) now provides that "the defendant has been convicted in the present

language means that the offenses involving more than one victim were prosecuted or tried together in the same case. (See *People v. Stewart* (2004) 119 Cal.App.4th 163, 171-172.)

Here, defendant was prosecuted in 1998 for lewd conduct involving M.W. In 2015, he was prosecuted for lewd conduct involving M.S. The multiple offenses involving more than one victim were not prosecuted together. Defendant was not convicted in the present case of committing an offense against more than one victim. Insufficient evidence supports the jury's multiple-victim circumstance finding. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Moreover, defense counsel rendered ineffective assistance in failing to object.

DISPOSITION

Defendant's convictions on counts 1 through 3 (lewd conduct, § 288, subd. (a)) are reversed and the multiple-victim circumstance finding is reversed. The stay of sentence on count 4 is lifted, resulting in a state prison sentence of 16 years. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is ordered to forward a copy of this opinion to the State Bar upon finality of this appeal.[6] Further, pursuant to Business and Professions Code section

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case or cases of committing an offense specified in subdivision (c) against more than one victim."

[6] Business and Professions Code section 6086.7, subdivision (a)(2) requires the court to notify the State Bar "[w]henever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney."

6086.7, subdivision (b), the clerk of this court shall notify defendant's trial counsel that the matter has been referred to the State Bar.

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Mauro, J.